August 12, 2024

The Honorable Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Re: Prohibition on Creditors and Consumer Reporting Agencies Concerning Medical Information (Regulation V) (89 FR 51682)

Dear Director Chopra:

The American Financial Services Association (AFSA)[1] writes regarding the Consumer Financial Protection Bureau's (CFPB) rulemaking removing medical bills from most credit reports. AFSA supports the CFPB's mission to protect consumers. This rulemaking, however well-intentioned, could have the opposite effect and harm consumers by restricting lenders from performing a full ability to repay analysis and raise the price of lending. Below, we explain: that the CFPB lacks authority for this rulemaking, the rule does not provide a clear definition of medical debt, there are conflicts with existing regulations and the CFPB's own enforcement action, and disrupt a working consumer reporting system.

I. CFPB lacks authority for this rulemaking

At the outset, the CFPB lacks the authority to prohibit credit reporting agencies from providing medical debt information in consumer reports. The Fair Credit Reporting Act (FCRA) limits the CFPB's rulemaking to the "uses" of medical information, but not explicitly give the CFPB authority to restrict that information from being included in consumer reports.[2] In fact, the FCRA specifically permits providing medical information, so long as it is properly coded to mask the provider or nature of the services.[3]

At its root, the rule misapprehends how FCRA deals with creditors obtaining and considering medical debt. The rule assumes that FCRA includes a blanket prohibition on those activities. That assumption is wrong. The statute expressly allows creditors to consider consumer tradelines that might otherwise include medical information so long as that information is appropriately coded. The relevant statutory provision states that "a creditor shall not obtain or use medical information (*other than medical information treated in the manner required under section*

[1] Founded in 1916, the American Financial Services Association (AFSA) is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.
[2] 15 U.S.C. § 1681b(g)(3)(c) or (g)(5)(A)
[3] 15 U.S.C. § 1681b(g)(1)(c)

1681c(a)(6) of this title) pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit."[4] (emphasis added). The italicized provision—which the Bureau ignores in this rulemaking—is key. It exempts from the prohibition medical information that is "restricted or reported using codes that do not identify, or provide information sufficient to infer, the specific provider or the nature of such services, products, or devices to a person other than the consumer."[5] Creditors may obtain and use medical information so long as it is coded so that the creditor cannot determine the provider or the nature of the services provided. The clear statutory text of FCRA allows this, and the Bureau may not alter that by rule. As the Supreme Court has noted, "an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate."[6]

Creditors must be free to consider a consumer's financial condition when making a lending decision. Medical debt is relevant to that analysis. Congress knew that medical debt is relevant to that analysis, but wanted to make sure that creditors did not draw unwarranted assumptions from certain parts of medical debt—such as the nature of the provider—in the process. As one member of Congress noted during a hearing on the issue, the purpose of the rule was to create "a method so that the financial end of [a medical tradeline] could be presented, but the entity providing that service is not listed."[7] That is in fact what Congress did when it expressly carved out from the blanket prohibition on considering medical information such information that hid the identity of the medical provider and the services provided.

What the Bureau labels as the "financial information exception" in the current rules governs only how creditors may obtain and consider *uncoded* medical information: only consider that which is "routinely used in making credit eligibility determinations;" do not treat medical information any less favorably than non-medical information; and do not take into account non-financial aspects of the information, such as "physical, mental, or behavioral health."[8] The rules require creditors to treat uncoded medical information just like it would treat coded medical information. By its terms, these regulatory requirements can only apply to uncoded information because a creditor that receives coded medical information has no data on the consumer's "physical, mental, or behavioral health" that it might be tempted to consider in the first place.

The purpose of FCRA's prohibition on creditors considering "medical information" was never to prohibit consideration of the financial aspects of medical debt, but to prevent creditors from considering the non-financial aspects when making their evaluations. To meet this objective, Congress prohibited creditors from obtaining and considering all medical information (including the financial aspects of medical information), but carved out from that prohibition a creditor's ability to consider the financial aspects of a medical transaction that does not include the provider or the nature of the services provided. The Bureau has no authority to dictate otherwise.

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[4] 15 U.S.C. § 1681b(g)(2)
[5] 15 U.S.C. § 1681c(a)(6)
[6] Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 328 (2014).
[7] Hearing before the Committee on Financial Services on HR 2622 – Fair and Accurate Credit Transactions Act
[8] 12 C.F.R. § 1022.30(d)(1).

II. The rule needs to clarify the definition of medical debt

AFSA is concerned that the proposed rule will cause unintended consumer harm due to the nebulous way that the CFPB defines medical debt. The CFPB defines medical debt in this proposal as:

> "medical information that pertains to a debt owed by a consumer to a person whose primary business is providing medical services, products, or devices (e.g., a medical or health care provider), or to the person's agent or assignee, for the provision of such medical services, products, or devices. The definition would also clarify that medical debt information includes, but is not limited to, medical bills that are not past due or that have been paid."[9]

AFSA strongly supports the CFPB's proposed definition of "medical debt information" as relating to debts owed directly to a health care provider, and not debts owed to third-party lenders. The final rule should affirmatively state that "medical debt information" does not include medical payment products or general purpose credit. A broader definition of medical debt information, which includes all debts related to a transaction arising from a medical service, product, or device, would make it difficult or impossible for the consumer reporting agency or the lender to determine which transactions or portions thereof were for medical purposes or were medically necessary. For instance, a debt related to an in-house credit transaction with a pharmacy that provides pharmaceutical compounds would be covered by the broad nature of the CFPB's definition, even if the transaction results from the purchase of non-medical items that were purchased.

To the extent that medical bills are complicated or at times inaccurate, the solution to that problem resides in reforming the health care system. Removing medical debt from credit reports does not help demystify the medical billing system or increase the ability of consumers with medical debt to repay a new debt obligation. Rather, it simply hides what may be significant debts from creditors, which could potentially lead to lenders extending credit to consumers that they cannot afford. While the healthcare system can be complicated, there are measures in place for consumers to address what they believe to be erroneous medical bills. In fact, the proposed rule references a study where 79% of adults with health care debt who received a bill containing an error took action to dispute the mistake with their insurer or provider, and in many cases they succeeded in resolving the mistake.[10]

III. Potential conflict with existing rules and regulations

The proposed rule does not adequately address the potential conflict with lenders' obligations under Regulation Z and Unfair, Deceptive, or Abusive Acts or Practices (UDAAP), along with responsible lending principles to analyze a consumer's ability to repay any credit extended.

First, the Truth in Lending Act (TILA) and its implementing Regulation Z require financial institutions to consider all of a consumer's current debt obligations as part of the ability to repay

[9] https://www.federalregister.gov/d/2024-13208/p-180
[10] https://www.kff.org/policy-watch/could-consumer-assistance-be-helpful-to-people-facing-medical-debt/

analysis for home lending and credit card products. This includes medical debt, which is legally enforceable debt.

Second, it is common practice for lenders to complete an ability to repay analysis for all credit products under UDAAP and responsible lending principles. TILA, Regulation Z, and UDAAP are intended to protect consumers from taking on more debt than they can afford. The proposed rule acknowledges some of these requirements and permits creditors to consider medical debt information only to the extent that consumers self-report it and only if lenders do not request it.[11] However, inconsistent collection and consideration of medical debt information in credit decisioning will create fair lending and UDAAP risk for lenders.

In addition, if enforceable medical debt is scrubbed from the analysis, a cycle-of-debt situation could occur, where delinquent borrowers have no choice but to refinance existing credit in the hope that they will be able to repay it further down the line. This is not part of a responsible lending system. Even if the Bureau does not believe it should be on credit reports, non-reporting does not delete valid debt, and consumers are still responsible for paying it back. As a result, the ability-to-repay analysis will be missing the consumers' obligation and put the consumer at risk of default. To account for this increased risk, lenders might have to raise the cost of lending across the board.

IV. Conflict with the CFPB's enforcement action

Further, one of the CFPB's recent enforcement actions contradicts the proposed rule, meaning that both compliance and non-compliance would leave financial companies open to enforcement actions from the CFPB. This Catch-22 situation would leave lenders stymied and would cause a contraction in the lending system.

In a recent enforcement action, the Bureau accused a finance company of not being thorough enough in its ability to repay analysis, and therefore claimed the company was "abusive."[12] In the complaint, the CFPB states that the lender "does not consider—or even require dealers to ask about—the borrower's recurring debt obligations, rent or mortgage payment, or any of the other necessary expenses an individual incurs each month, including the cost of food, **healthcare**, or childcare" [emphasis added].[13] AFSA noted this inconsistency in its comments to the Small Business Review Panel, however, it has gone unaddressed in the rulemaking. Now, the CFPB is considering removing medical debt from consumer reports that financial institutions use in credit determinations, the very conduct cited as "abusive" in the enforcement action. This either negates previous CFPB enforcement action or institutes a rule which would allow the CFPB to categorize every lender as "abusive."[14]

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[11] https://www.federalregister.gov/d/2024-13208/p-253

[12] *Consumer Financial Protection Bureau v. Credit Acceptance Corporation* (1:23-cv-00038) District Court, S.D. New York

[13] *Ibid.*, pg. 8.

[14] To be clear, AFSA does not believe that lenders should have to ask their borrowers about the cost of food or how many children they have, but lenders should be able to see all debts on a credit report.

V. The rule will disrupt a working consumer reporting system

The interests of creditors, consumers, and regulators are aligned in favor of a system that makes the most accurate information available regarding consumers' financial condition. In our current system, consumer reports play a central role in helping creditors make the best possible underwriting decisions. Along with income and employment information, consumer reports and derived credit scores help creditors make accurate credit decisions and price credit efficiently. This benefits consumers also, as a declined credit application or a counteroffer for a lower credit amount may serve as a warning to a consumer that its debt obligations are higher than desirable. Moreover, having readily available access to information regarding consumer credit situations reduces the overall costs of lending, which benefits the consumer.

In this proposed rule, the CFPB attempts to remove a category of credit information from the consumer reporting ecosystem. Those debts that would be removed are lawful debts that consumers are legally obliged to pay and should be considered along with other debt when assembling consumer reports and calculating credit scores. A consumer's payment history on medical debt, whether excellent or otherwise, is pertinent information for a creditor to consider when assessing a consumer's application for credit. If medical debt were hidden from consumer reports and no longer considered in creating credit scores, creditors may take the step of assuming that all customers are carrying large invisible debts which would justify raising interest rates for everyone. This is unfair to consumers who have no medical debt and consumers who have medical debt and manage it successfully by making timely payments as agreed.

The consumer reporting ecosystem works best when information in consumer reports is accurate and comprehensive. The system is intended to serve as a mirror, providing a truthful and verifiable reflection of consumers' financial condition and history managing their use of credit. This system rewards people who use credit responsibly and tells the unvarnished truth about those who fail to keep up with their financial obligations. But even in cases of consumers who default on their obligations, the consumer reporting system is not punitive. The system reports facts about delinquency and default until such time as those events are removed from the system with the passage of time. The system is designed to forget past events.

This proposal suggests the CFPB wants the consumer reporting system to be a lens rather than a mirror. The CFPB would hide accurate information about consumers' financial condition from lenders in the service of other policy priorities. This is the wrong approach. We should be working to fill the consumer reporting system with accurate information that tells the truth about consumers' financial condition and credit usage so that consumers and creditors each make the best possible decisions regarding future extensions of credit.

VI. Conclusion

The Bureau has proposed a rule on a vast topic without proper authority and seemingly without considering the many unintended consequences that will follow. If finalized, the rule with have a broad negative effect on the consumer lending industry. Suppressing information about a consumer's debt will increase the cost of lending, as financial institutions will need to build in additional risk into the ability-to-repay analysis. This will reduce access to credit to those who

need it the most. AFSA encourages the CFPB to thoughtfully review this rulemaking so that it aligns with protecting consumers from harm, instead of opening new avenues of risk. Thank you for the opportunity to comment, and please feel free to contact me at 202-776-7300 or cwinslow@afsamail.org with any questions.

Sincerely,

Celia Winslow
Senior Vice President
American Financial Services Association